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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MARIAN KEEGAN,

Plaintiff and Appellant,

v.

CHARLES VIVIANI et al.,

Defendants and Respondents.

MARIAN KEEGAN,

Plaintiff and Appellant,

v.

THREE ARCH BAY COMMUNITY
SERVICES DISTRICT,

Defendant and Respondent.

G050032

(Super. Ct. No. 30-2010-00409507)

O P I N I O N

(Super. Ct. No. 30-2011-00529377)

Appeal from orders of the Superior Court of Orange County, Linda S.
Marks, Judge. Affirmed. Motion for sanctions granted.

Marian Keegan, in pro. per.; and Charles G. Kinney (now involuntarily

inactive) for Plaintiff and Appellant Marian Keegan.

Berger Kahn and Alan H. Boon for Defendants and Respondents Charles Viviani and Greg Viviani.

The Beggs Law Firm and Robert M. Beggs for Defendants and Respondents John Chaldy, Lynn Chaldy and the John Chaldy Trust.

Daley & Heft, Lee H. Roistacher, Richard J. Schneider and Reece A. Roman for Defendant and Respondent Three Arch Bay Community Services District.

* * *

As described more fully in the companion appeal of *Keegan v. Viviani* (2015, G048609) [nonpub. opn.], being filed concurrently herewith, this case involves consolidated lawsuits over flooding and parking issues on Virginia Way in Laguna Beach. After the court granted the summary judgment motions of defendants and respondents Three Arch Bay Community Services District (TAB), Charles Viviani, Greg Viviani, John Chaldy, Lynn Chaldy, and the John Chaldy Trust, it awarded costs in their favor as against plaintiffs Marian Keegan and Charles Kinney.

In this appeal, Keegan challenges the various costs awards against her. (The costs awards against Kinney as plaintiff are not at issue in this appeal.) Keegan asserts most of the memoranda of costs were untimely filed, all of the awards should be reversed if the underlying judgments are reversed, and the costs were overstated and not properly allocated in any event. We affirm. We also grant the motion of TAB for sanctions as against Attorney Kinney.

I

DISCUSSION

A. Untimely Costs Memoranda:

Keegan devotes most of her briefing on appeal to rearguing flooding and parking issues that are not now before us. When she gets past that and turns to the costs awards at issue in this appeal, her lead argument is that the memoranda of costs filed by

TAB, Charles Viviani and the Chaldus were untimely filed under California Rules of Court, rule 3.1700(a)(1).¹

California Rules of Court, rule 3.1700(a)(1) provides: “A prevailing party who claims costs must serve and file a memorandum of costs within 15 days after the date of mailing of the notice of entry of judgment or dismissal by the clerk under Code of Civil Procedure section 664.5 or the date of service of written notice of entry of judgment or dismissal, or within 180 days after entry of judgment, whichever is first. . . .”

(1) TAB—

In its May 29, 2013 minute order, the court granted the summary judgment motion of TAB as against Keegan and ordered TAB to prepare a formal order and a judgment. On June 19, 2013, a formal order granting summary judgment in favor of TAB was filed and a judgment in favor of TAB was entered.

On July 2, 2013, TAB filed a notice of entry of judgment or order, to which a copy of the June 19, 2013 order granting summary judgment was attached. The proof of service shows that the notice was served by mail on July 2, 2013. Two weeks later, on July 16, 2013, TAB filed its memorandum of costs, seeking \$8,344.58 as against Keegan, which the court awarded in full.

Keegan claims TAB’s memorandum of costs was untimely, as filed after the 15-day deadline of California Rules of Court, rule 3.1700(a)(1). Keegan asserts that “TAB gave ‘written notice’ of the judgment in favor of TAB via e-service [CT 129, #790]” on June 4, 2013. She reasons that TAB’s costs memo had to be filed no later than June 24, 2013. (Cal. Rules of Court, rule 3.1700(a)(1) [15 days]; Code Civ. Proc., § 1010.6, subd. (a)(4) [2 more days for e-service].) Because TAB did not file its costs memo until July 16, 2013, Keegan says it was untimely.

¹ She concedes that the memorandum of costs filed by Greg Viviani was timely.

The record does not contain a copy of any June 4, 2013 notice of judgment. It is Keegan's burden to provide an adequate record to support her argument and she has failed to do so. (*Oliveira v. Kiesler* (2012) 206 Cal.App.4th 1349, 1362.) Keegan's only record reference on the point is to the register of actions, which shows that on June 4, 2013, TAB filed a notice of ruling. Inasmuch as judgment for TAB was not entered until June 19, 2013, any prior notice of entry of judgment would have been premature and nonsensical. However, a June 4, 2013 notice of the ruling on the summary judgment motion would have been appropriate. But it would not have been, and could not have been, a notice of entry of *judgment* as required to trigger the 15-day period of California Rules of Court, rule 3.1700(a)(1). Keegan's argument is frivolous.

(2) *Charles Viviani and the Chaldus*—

In its May 29, 2013 minute order, the court granted the summary judgment motion of Charles Viviani and the Chaldus as against Keegan and ordered the prevailing parties to prepare formal orders and judgments. On May 31, 2013, the Chaldus filed a notice of rulings after hearing, in which they stated that the court had granted the summary judgment motion of Charles Viviani and the Chaldus and had ordered counsel to prepare an order granting summary judgment. The notice of ruling was served electronically on the same date.

On June 19, 2013, a formal order granting summary judgment in favor of Charles Viviani and the Chaldus was filed. Thereafter, on July 22, 2013, Charles Viviani filed his memorandum of costs as against Keegan, seeking \$7,809.41.

On July 26, 2013, Charles Viviani and the Chaldus filed a notice of entry of judgment, to which a copy of the June 19, 2013 formal order was attached. The notice was served electronically on July 26, 2013. Also on July 26, 2013, the Chaldus filed their memorandum of costs as against Keegan, seeking \$4,465.75. The court awarded the Chaldus the full amount sought. In addition, it found Keegan had waived her right to challenge Charles Viviani's \$7,809.41 costs memo. It awarded to Charles Viviani

\$2,295.05 against Keegan solely and severally, and \$3,226.39 against Keegan and Kinney jointly and severally.

Keegan argues the respective memoranda of costs, filed by Charles Viviani and the Chaldus, were untimely, as filed after the 15-day deadline of California Rules of Court, rule 3.1700(a)(1). Focusing on the May 31, 2013 notice of rulings after hearing, filed by the Chaldus, Keegan maintains that the costs memoranda from Charles Viviani and the Chaldus were due by June 19, 2013. Since they were not filed until July, Keegan argues they were late.

Once again, her argument is frivolous. The 15-day deadline of California Rules of Court, rule 3.1700(a)(1) is clearly triggered by “the date of mailing of the notice of entry of judgment . . . by the clerk . . . or the date of service of written notice of entry of judgment” Keegan would have us discard the plain wording of the rule and have the deadline begin to run before judgment is ever even entered.

B. Other Arguments:

Almost as an afterthought, Keegan argues in one sentence that if the judgments are reversed, the costs awards should fall with them. However, in the companion appeal, we affirmed the judgments. Consequently, the costs awards do not fail.

Keegan also asserts that the costs are overstated and are not properly allocated in any event. However, she provides no record references in support of her argument. Her argument is waived. (*Roden v. AmerisourceBergen Corp.* (2010) 186 Cal.App.4th 620, 634.)

Finally, in her appellant’s reply brief, Keegan makes an argument about costs properly allowable to Greg Viviani, to whom the court awarded \$11,195.30. We do not consider Keegan’s argument both because it is made for the first time in her reply brief and because it is unsupported by record references. (*Schubert v. Reynolds* (2002) 95

Cal.App.4th 100, 108 [argument raised in reply brief]; *Roden v. AmerisourceBergen Corp.*, *supra*, 186 Cal.App.4th at p. 634 [failure to provide record references].)

C. TAB's Sanctions Motion:

TAB has filed a motion for sanctions against both Keegan and Kinney, who was Keegan's attorney of record when her notice of appeal and briefs on appeal were filed. TAB claims Keegan's appeal was frivolous, because no reasonable attorney could believe there was any merit to Keegan's argument that TAB's memorandum of costs was untimely.

In opposition, Keegan again belabors the merits of the underlying litigation, beginning with five pages under the topic heading "THE LONG HISTORY OF TAB'S FLOODING." (Underscoring omitted.) She also reiterates the preposterous argument that TAB's June 4, 2013 notice of ruling triggered the running of the 15-day deadline under California Rules of Court, rule 3.1700(a)(1), even though judgment was not even entered until June 19, 2013. She also mentions that the costs orders should be reversed if the judgments are reversed.

This last argument is the only one with merit. However, Keegan's 34-page opening brief on appeal only devoted one sentence to that argument, as we have stated. Yet opposing counsel had to trudge through the other 33-plus pages to ascertain the arguments requiring a response, and to research and write a respondent's brief addressing the arguments raised.

As TAB points out, case law shows "that sanctions may be awarded for an appeal that was only partially frivolous. [Citations.]" (*People ex rel. Dept. of Transportation v. Outdoor Media Group* (1993) 13 Cal.App.4th 1067, 1080.) Here, the appeal was almost completely frivolous, save one argument meriting a solitary sentence, i.e., the argument that the costs orders should be reversed if the judgments are reversed.

In her opposition, Keegan now leads with the automatic reversal argument. She also indicates that her argument about California Rules of Court, rule 3.1700(a)(1) could not be frivolous because “there is a dispute as to the application of” the rule. In other words, she appears to argue that because TAB did not agree with her contention about the rule this proves there is a reasonable disagreement as to the interpretation of the rule. Not so.

As “our Supreme Court has explained ‘an appeal should be held to be frivolous only when it is prosecuted for an improper motive . . . or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit.’ [Citation.]” (*Kleveland v. Siegel & Wolensky, LLP* (2013) 215 Cal.App.4th 534, 556.) We find the latter situation here. Any reasonable attorney would agree that it is totally and completely without merit to argue that a June 4, 2013 notice of ruling with respect to a minute order constituted a “written notice of entry of judgment” when the judgment was not entered until June 19, 2013.

The fact that Kinney, an attorney, asserted that argument does not ipso facto make it an argument a reasonable attorney would agree had merit. Rather, even when an attorney appears to believe in his or her own argument, this “makes no difference if any *reasonable* person would agree the grounds . . . were totally and completely devoid of merit. [Citation.]” (*Kleveland v. Siegel & Wolensky, LLP, supra*, 215 Cal.App.4th at pp. 556-557, italics added.) No *reasonable* person would agree that a notice of ruling given 15 days before judgment was entered could possibly be construed as a notice of entry of the subsequent judgment.

“Having concluded sanctions are warranted, we must determine an appropriate amount. ‘Factors relevant to determining the amount of sanctions to be awarded a party responding to a frivolous appeal include “the amount of respondent’s attorney fees on appeal; the amount of the judgment against appellant; the degree of objective frivolousness and delay; and the need for discouragement of like conduct in the

future.” [Citations.]” (*Kleveland v. Siegel & Wolensky, LLP, supra*, 215 Cal.App.4th at p. 558.)

Here, appellant Keegan was the plaintiff, whose consolidated cases were resolved through summary judgment. The degree of frivolousness was great—her primary argument, pertaining to the timeliness of TAB’s costs memo, was utterly absurd. And the need to discourage the conduct of Attorney Kinney, whose bad tactics are well known, is great. (See, e.g., *In re Kinney* (2011) 201 Cal.App.4th 951.)

So, we turn to the fees sought. The declaration filed by counsel for TAB shows counsel charged TAB \$165 per hour—a reasonable rate. Counsel declared that he “spent 12.7 hours reviewing filings and notices in connection with this appeal, reviewing the record, the opening brief and preparing the respondent’s brief.” Counsel further declared: “I spent 3.8 hours preparing this motion for sanctions and this declaration. I anticipate another 15 hours to be incurred in reviewing the reply brief, reviewing any opposition to this motion, preparing a reply to that opposition and preparing for and attending oral argument, including travel time.” TAB requested a total of \$5,197.50, for 31.5 hours at \$165 dollars per hour.

Inasmuch as Keegan could have filed a reasonable opening brief stating simply that the costs orders should be reversed if the judgments were reversed, and TAB would have needed to file a minimal response thereto, we conclude that at least three hours would have been spent in filing TAB’s respondent’s brief had a reasonable opening brief been filed. Consequently, we reduce the requested sanctions award by \$495 for three hours of work. Furthermore, since TAB’s fee estimate included time for filing a reply to Keegan’s opposition to the sanctions motion, but no reply was ultimately filed, we further reduce the requested sanctions award by another \$165 for an hour of work. The total reduction in the amount sought is \$660 for four hours of work.

We hereby award \$4,537.50 in sanctions against Attorney Kinney in favor of TAB. We decline the request to impose the award against Keegan as well as Attorney

Kinney inasmuch as she was not the one who framed the absurd legal argument or dragged out the opening brief with unnecessary rhetoric about flooding.

II

DISPOSITION

The orders are affirmed. TAB's motion for sanctions is granted in part. Attorney Kinney is ordered to pay sanctions in the amount of \$4,537.50 to TAB. All respondents shall recover their costs on appeal.

The clerk of this court is directed to provide copies of this opinion to the State Bar of California and to Kinney. (Bus. & Prof. Code, § 6086.7, subds. (a)(3) & (b).)

MOORE, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.